RE TUNG ENG HAI; EX P OVERSEAS UNION BANK (M) BHD

HIGH COURT MALAYA, PULAU PINANG
WONG TECK MENG JC
[BANKRUPTCY NO: 29-200-1997]
2 FEBRUARY 2015

BANKRUPTCY: *Discharge – Order of discharge – Appeal against – Whether judgment creditor correct to set aside order of discharge by summons in chambers under O. 32 r. 6 of the Rules of Court 2012 – Whether judgment creditor ought to appeal under s. 90(1) of the Bankruptcy Act 1967*

The judgment debtor ('JD') was adjudged a bankrupt in 2003 and in 2013, filed an application for order of discharge ('the application') with a 'Sijil Bilangan Pemiutang' at the Penang High Court. The Director-General of Insolvency ('DGI') was then given a notice of the application for discharge by the Penang High Court. However, the application was adjourned by the Senior Assistant Registrar ('SAR') to enable the DGI to prepare the relevant reports in respect of the application. On the next date of hearing, the application was heard before another SAR, who allowed the application. The SAR had only heard counsel for the JD and the officer of DGI, but in the absence of the judgment creditor ('JC') due to a miscommunication on the change of the SAR hearing the case. The JC then filed a summons in chambers (encl. 87) for an order to set aside the order of discharge of bankruptcy under s. 33 of the Bankruptcy Act 1967 ('BA'). At the hearing of encl. 87, the JD raised a preliminary objection against the JC on the ground that the JC's application to set aside the discharge order by way of summons in chambers was wrong in law and ought to have been proceeded by way of a notice of appeal to the judge in chambers. The SAR upheld the preliminary objection and dismissed the summons in chambers without hearing it on its merits. Hence, this appeal. It was argued for the JC that since there was no specific provisions under the BA and Bankruptcy Rules 1969 ('BR') that dealt with setting aside of an *ex parte* order, r. 276 of the BR applied to incorporate the use of the Rules of Court 2012 to fill up the *lacuna* in the bankruptcy law and therefore, the application to set aside the order of discharge by way of summons in chambers was allowed and correctly made under O. 32 r. 6 of the Rules of Court 2012 ('ROC'). In the alternative, the JC submitted that the court had the discretion under O. 32 r. 5(3) to rehear the application for order of discharge. Meanwhile, the JD argued that s. 90(1) of the BA provided expressly and clearly that any order, act or decision made by the Registrar in a bankruptcy proceeding shall be subject to appeal and therefore, the correct procedure to set aside the order, act or decision ought to be by way of appeal and not by summons in chambers. The sole issue for

A determination was as to whether the JC, as an aggrieved party, was allowed and correct to have applied to set aside the order of discharge of bankruptcy by way of summons in chambers and not by an appeal.

Held (allowing appeal):

B **(1)** The case *Re Ng Seng Heng: Ex P Mayban Securities Sdn Bhd* did not make any ruling that all orders and decisions of the Bankruptcy Court must only proceed by appeal by the aggrieved party and was not an authority barring an aggrieved party from applying by summons in chambers to set aside an order granted in the absence of the aggrieved party in a C bankruptcy proceeding, in other words an *ex parte* hearing. (paras 15 & 16)

(2) Based on r. 276 of the BR, the JC may use O. 32 r. 6 of the ROC to set aside an *ex parte* bankruptcy order. Furthermore or in the alternative, the JC may also move the court to rehear the application for order to D discharge under O. 32 r. 5(3) of the ROC. (para 21)

(3) Past cases had clearly stated the law that when an order was made *ex parte*, the correct procedure was for the aggrieved party to apply to have it set aside by the judge who made it and not by way of an appeal. The JC therefore took the correct path to apply by encl. 87 to set aside the E *ex parte* order of discharge. Hence, the preliminary objection raised by the JD that the JC ought to appeal against the said order was baseless and misconceived. (paras 25 & 26)

(4) The SAR who entertained the preliminary objection raised by the JD and in the result summarily dismissed the application to set aside the *ex* F *parte* order without hearing the merits of the application, should have considered O. 1A of the ROC and should have been enlightened on the importance of the overriding interest of justice as opposed to technical non-compliance of the ROC. Hence, the JC should have been allowed to have encl. 87 heard on merits instead of being summarily dismissed G based on the preliminary objection which was baseless and misconceived. The JC was only seeking his right to be heard in encl. 87 and as such justice should have been accorded to him without any technical hurdles placed along the path. (paras 31-34)

(5) The case of *Re Chops Loh Kee Seng and Loh Chee Seng* clearly authorised H an application to set aside an *ex parte* order in bankruptcy matters pursuant to s. 90(1) of the Bankruptcy Ordinance No. 44 (1888) which is in *pari materia* with s. 92(1) of the Bankruptcy Act 1967. Therefore, the JC was correct in adopting the procedure of applying to set aside the order of discharge *vide* encl. 87 based on O. 32 r. 6 of the ROC and/ I or s. 92(1) of the Bankruptcy Act 1967. (paras 35-37)

Case(s) referred to:

Amirthanayaki Kumarasamy v. Lembaga Kelayakan Profesion Undang-Undang, Malaysia [2010] 6 CLJ 593 CA ***(refd)***

Ber: Pardeep Kumar Om Parkash Sharma; Ex parte: Abdullah Sani Hashim [2001] 1 LNS 94 HC ***(refd)***

Datuk M Kayveas v. PV Das [1997] 4 CLJ 544 CA ***(refd)***

Konsortium Abass Sdn Bhd v. Syarikat Bekalan Air Selangor Sdn Bhd; Kerajaan Negeri Selangor (Third Party) [2012] 1 LNS 1046 HC ***(refd)***

Lee Phet Boon v. Hock Thai Finance Corporation Bhd [1994] 3 CLJ 466 HC ***(refd)***

Munusamy Karuppiah v. Sang Lee Company Sdn Bhd & Ors [2010] 3 CLJ 924 CA ***(refd)***

Re Chops Loh Kee Seng and Loh Chee Seng [1926] 1 LNS 11 HC ***(refd)***

Re Ng Seng Heng, Ex P Mayban Securities Sdn Bhd [2003] 7 CLJ 252 HC ***(refd)***

RHB Bank Bhd v. FGG Wood Mouldings Industries Sdn Bhd & Ors [2001] 3 CLJ 661 HC ***(refd)***

Uni Wall Architectural Products & Services Sdn Bhd v. Global Upline Sdn Bhd (No 2) [2011] 6 CLJ 477 HC ***(refd)***

United Engineers (Malaysia) Bhd v. Seow Boon Cheng & Anor [2001] 6 CLJ 190 HC ***(refd)***

United Overseas Bank Ltd v. Chung Khiaw Bank Ltd [1968] 1 LNS 163 FC ***(refd)***

Legislation referred to:

Bankruptcy Act 1967, ss. 33, 90(1), 92(2)
Bankruptcy Ordinance No. 44 (1888), s. 90(1)
Bankruptcy Rules 1969, r. 276
Rules of Court 2012, O. 1A, O. 32 rr. 5(3), 6

For the appellant/judgment creditor - Jenny Saw; M/s Choy & Assocs
For the respondent/judgment debtor - Tan Weng Hua; M/s Manjit Singh Sachdev, Mohammad Radzi & Partners

Reported by Lyana Shohaimay

JUDGMENT

Wong Teck Meng JC:

Facts

[1] The judgment debtor was adjudged bankrupt on 7 August 2003. On 20 June 2013, the judgment debtor filed an application for order of discharge together with the "Sijil Bilangan Pemiutang" at the Penang High Court.

[2] A notice to official assignee of the application for discharge dated 12 July 2013 was given to the Director General of Insolvency by the Penang High Court. The said application for order of discharge was fixed for hearing on 31 July 2013.

[3] However on 31 July 2013, the hearing of the said application for order of discharge was adjourned by the Senior Assistant Registrar Aziana bte Azib to 28 August 2013 to enable the Director General of Insolvency to prepare the relevant reports in respect of the said application.

[4] On 28 August 2013 at around 10am, it transpired that the said application for order of discharge was heard by another Senior Assistant Registrar Fadrina bte Zulkhairi who allowed the judgment debtor's said application for order of discharge. The Senior Assistant Registrar only heard the counsel of the judgment debtor and the officer of the Director General Insolvency Rozana bte Ramli.

[5] Thereafter on 30 August 2013, the judgment creditor filed a summons in chambers (encl. 87), for, amongst others, an order to set aside the order of discharge of bankruptcy obtained by the judgment debtor on 28 August 2013 under s. 33 of the Bankruptcy Act 1967.

[6] To cut the matter short, when encl. 87 was fixed for mention/hearing before the Senior Assistant Registrar, counsel for the judgment debtor raised a preliminary objection against the judgment creditor's said encl. 87 on the ground that the judgment creditor's application to set aside the discharge order of 28 August 2013 by way of summons in chamber is wrong in law as it ought to be proceeded with by way of a notice of appeal to judge in chambers. Hence both the judgment creditor and judgment debtor filed their written submissions on the preliminary objection raised by the judgment debtor.

[7] On 16 June 2014, the Senior Assistant Registrar upheld the preliminary objection raised by counsel for the judgment creditor and dismissed the summons in chambers without hearing it on the merits. The Senior Registrar opined that the proper procedure was by an appeal against the order of discharge of bankruptcy and not by way of summons in chambers to set aside the said order. Hence, the appeal by the judgment creditor against the decision of the Senior Assistant Registrar on the preliminary objection.

[8] It is not disputed that the order of discharge of bankruptcy obtained by the judgment debtor on 28 August 2013 before the Senior Assistant Registrar was made in the absence of the judgment creditor's counsel.

[9] The counsel for judgment creditor had on 28 August 2013 at about 9am registered the case number into the kiosk machine which showed that the hearing of the application for discharge of bankruptcy was fixed before Senior Assistant Registrar Aziana bte Azib. As a result, counsel for the judgment creditor went to the chambers of Aziana bte Azib but was informed by an Insolvency Officer Fatimah that Aziana bte Azib had gone out to attend a meeting and that the matter has been fixed before another Senior Assistant Registrar Nur Fadrina bte Zulkhairi. Thereafter, counsel for the judgment creditor went to the chambers of Nur Fadrina bte Zulkhairi and waited for his turn for the case to be called up.

[10] However, when counsel for the judgment creditor appeared before Nur Fadrina bte Zulkhairi at about 10am, he was informed that the order for discharge of the bankruptcy was given earlier on in the absence of counsel

for the judgment creditor. Counsel for judgment creditor had wanted to object to the application for discharge of bankruptcy by the judgment debtor. On the part of the judgment debtor, he had attended with his counsel before Nur Fadrina bte Zulkhairi and the order for discharge of bankruptcy was given at 9.50am. The Insolvency Officer Rozana also attended.

[11] In essence, the facts are clear ie the order for discharge of bankruptcy was made in the absence of the judgment creditor without an opportunity given to the judgment creditor to be heard and who was present in the court but due to a miscommunication he was unable to attend to the chambers of Nur Fadrina bte Zulkhairi in time. It was not his fault when the case was listed before the previous Senior Assistant Registrar but refixed before another without prior notice given to him.

Findings

[12] Counsel for the judgment debtor submits that by s. 90(1) of the Bankruptcy Act 1967, any order made or act done by the Registrar in the exercise of the powers and jurisdiction in bankruptcy shall subject to an appeal be deemed the order or act of the High Court, and with reference to s. 92(2) of the said Act, orders in bankruptcy matters shall, at the instance of any person aggrieved be subject to appeal in the same way as order of the High Court in other matters are for the time being appealable.

[13] Hence, her submission is that the Bankruptcy Act clearly and expressly provides that any order, act or decision made by the Registrar in a bankruptcy proceedings shall be subject to appeal and not by summons in chambers to set aside the order, act or decision she submits that the proper procedure for the judgment creditor being the aggrieved party ought to be by way of appeal against the decision/order of the Senior Assistant Registrar given on 28 August 2013.

[14] Counsel for judgment debtor quoted the case of *Re Ng Seng Heng, Ex P Mayban Securities Sdn Bhd* [2003] 7 CLJ 252; [2003] 6 MLJ Supp 763 to impress upon this court that in the said case, the aggrieved judgment creditor appealed against the decision given by the Bankruptcy Court and as such that was the correct procedure to do so.

[15] Having read *Re Ng Seng Heng* (*supra*), I am of the view that the case did not make any ruling that all orders and decisions of the Bankruptcy Court must only proceed by appeal by the aggrieved party. In the said case, the matter there was heard and decided on merits after hearing all the parties and/or with the presence of all the relevant parties including the judgment creditor, judgment debtor and the Insolvency Officer (*inter parte*), hence the aggrieved party lodged an appeal against the decision of the Bankruptcy Court.

[16] The said case is not an authority barring an aggrieved party from applying by summons in chambers to set aside an order granted in the absence of the aggrieved party in a bankruptcy proceeding, in other words an *ex parte* hearing.

[17] On the other hand, counsel for judgment creditor submits that the order of discharge of bankruptcy granted by the Senior Assistant Registrar on 28 August 2013 was an *ex parte* order as the hearing of the matter was *ex parte* ie in the absence of the judgment creditor. The case of *United Overseas Bank Ltd v. Chung Khiaw Bank Ltd* [1968] 1 LNS 163; [1968] 2 MLJ 85 (Federal Court) was quoted where at p. 87 it held that:

> It is clear then that a judge may proceed *ex parte* to hear an application where a party duly served fails to appear at the time appointed for the hearing. An applications heard in the absence of a party is not an *ex parte* application. It is the hearing which is *ex parte* and order made on such a hearing is an *ex parte* order within the terms of Order L111 rule 4(1).

Order L111 r. 4(1) reads:

> Any order made *ex parte* may be varied or set aside on application by any person affected by it, to a judge on such terms as to costs or otherwise as the judge seem fit.

[18] The judgment creditor further submits that since there are no specific provisions under the Bankruptcy Act 1967 and Bankruptcy Rules 1969 that deal with setting aside of an *ex parte* order, r. 276 of the Bankruptcy Rules 1969 applies to incorporate the use of the Rules of High Court to fill up the lacuna in the bankruptcy law. Rule 276 Bankruptcy Rules 1969 reads as follow:

> In the absence of any rule regulating any proceeding under the Act or these Rules, the Rules of the High Court PU(A) 50/1980 shall apply *mutatis mutandis*.

[19] Hence, according to the judgment creditor, the application to set aside the order of discharge of bankruptcy (encl. 87) was allowed and correctly made under O. 32 r. 6, Rules of Court 2012.

[20] Further and/or in the alternative, the judgment creditor submits that the court has the discretion under O. 32 r. 5(3) Rules of Court 2012 to rehear the application for order of discharge if satisfied that it is just to do so.

[21] I am in total agreement with the above submission of the counsel for judgment creditor as the position of law was correctly stated by him. It is my considered view that based on r. 276 of the Bankruptcy Rules 1969, the judgment creditor may use O. 32 r. 6 to set aside an *ex parte* bankruptcy order. Furthermore or in the alternative, the judgment creditor may also move the court to rehear the application for order of discharge under O. 32 r. 5(3) of Rules of Court 2012.

[22] For clarity, I reproduce the relevant O. 32 of the Rule of Court 2012 here.

Order 32 r. 6 Rules of Court 2012 reads: A

6. The Court may set aside an order made *ex parte*.

Order 32 r. 5(3) Rules of Court 2012 reads:

5. (3) Where the Court hearing an application proceeded in the absence of a party, then, whether or not an order made on the hearing has been perfected, the Court, if satisfied that it is just to do so, may re-hear the application. B

[23] The position taken by the judgment creditor to apply to set aside the *ex parte* order of discharge is supported by a long line of case law authorities. In *Datuk M Kayveas v. PV Das* [1997] 4 CLJ 544 (Court of Appeal), Mahadev Shankar JCA held as follows: C

Counsel for Kayveas, Mr Nabhan submitted that the said injunction in the High Court was an *ex parte* order but it was nevertheless appealable! There are serious procedural implications here ... Notwithstanding s. 67 of the Courts of Judicature Act 1964 the proper remedy in the High Court for a party aggrieved by an order made *ex parte* in his absence is not to appeal but to apply to have it set aside by the judge who made it. (See O. 13 r. 8, O. 14 r. 11, O. 19 r. 9, O. 32 r. 6 and O. 35 r. 2 of the RHC 1980 read with r. 14 of the Court of Appeal Rules). D

[24] Next is the case of *Munusamy Karuppiah v. Sang Lee Company Sdn Bhd & Ors* [2010] 3 CLJ 924 (Court of Appeal) where at pp. 932 and 933 it was held that: E

[24] There are exceptions which allow JC2 to set aside or amend JC1's order without the need to file an appeal to the Court of Appeal and these exceptions are set out in the Rules of the High Court 1980 ("RHC") and in the relevant authorities. They may be stated as follows: F

(a) ...

(b) A final order may be set aside or amended without the need to appeal in a situation where the order is made in the absence of the other party at the hearing as envisaged O. 28 r. 4(1) of the RHC; O. 32 r. 6 of the RHC; and O. 35 r. 2 of the RHC. G

(c) ...

(d) Order 32 r. 6 of the RHC states that the court may set aside an order made *ex parte*. This rule is good piece of legislation because it protects the basic right of the litigants in that the party who has not been heard may apply to the court to have that order discharged forthwith (*Boyle v. Sacker* [1888] 39 Ch D 249, at p. 251; *Becker v. Noel And Another, Practice Note* [1971] 1 WLR 803, CA; and *Tan Poey Kheng v. Ma Peng Kiat* [1983] 1 LNS 56 (HC). It is trite law that a judge does not become *functus officio* after issuing an *ex parte* order. In an originating summons procedure under O. 28 r. 4(1) of the RHC, an *ex parte* order may be varied or revoked by a subsequent order of the court on such terms as it thinks fit. According to cases like *Lee Phet Boon v. Hock Thai Finance Corp Bhd* [1994] 3 CLJ 466; and *Datuk M* H I

A

> *Kayveas v. PV Das* [1997] 4 CLJ 544, CA, an application to set aside an *ex parte* order is not an appeal and a court of co-ordinate jurisdiction may exercise the power to vary or revoke it.

[25] The above two Court of Appeal cases of *Datuk M Kayveas* (*supra*) and *Munusamy Karuppiah* (*supra*) have clearly stated the law than when an order
B was made *ex parte*, the correct procedure is for the aggrieved party to apply to have it set aside by the judge who made it and not by way of an appeal.

[26] In the present case, the judgment creditor therefore took the correct path to apply by encl. 87 to set aside the *ex parte* order of discharge dated 28 August 2013. Hence, the preliminary objection raised by the judgment
C debtor that the judgment creditor ought to appeal against the said order is baseless and misconceived.

[27] Numerous High Court cases have affirmed the position of the law as adumbrated above and I only need to quote two such cases to prove the point further.

D

[28] In *Lee Phet Boon v. Hock Thai Finance Corporation Berhad* [1994] 3 CLJ 466 (High Court), Abdul Kadir bin Sulaiman J (as he then was) at p. 469 decided that:

> As mentioned earlier, his order is not a final order as it was made *ex parte;*
E Under O. 28 r. 4(1) the said order "may be varied or revoked by a subsequent order of the Court on such terms as it thinks fit". Under O. 32 r. 6 such an order may be set aside by the Court. There are ample authorities on that which allow the Court of a co-ordinate jurisdiction to deal with the matter. An application to set aside an *ex parte* order is not an appeal which requires a Court of superior jurisdiction to deal with it.
F This is so in regard to the principal prayer of the plaintiff praying for the discharge or the setting aside of the order.

[29] In *RHB Bank Bhd v. FGG Wood Mouldings Industries Sdn Bhd & Ors* [2001] 3 CLJ 661 (High Court), Kang Hwee Gee J (as he then was) at p. 666 held as follows:

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> For the reason alluded to earlier, I am of the view that there is always a right in an interlocutory proceeding for a party to apply under O. 32 r. 6 to set aside an order made *ex parte* in his absence whether or not the matter before the judge was heard on the merit, and whether or not the matter was an appeal from the decision of the registrar or an application
H in chambers *per se*. The nature of O. 32 r. 6 may be better understood by referring to the commentary in *The Supreme Court Practice 1995* vol. 1 at 32/1-6/25 which reads:
>
> > By its nature an *ex parte* order is essentially a provisional order made by a judge on the basis of the evidence and submissions
I emanating from one side only and there is therefore no basis for making a definitive order an accordingly when the judge reviews his provisional order in the light of evidence and argument

> adduced by opposite party, he is not hearing an appeal from himself and is in no way inhibited from discharging or varying his original order (per Sir Jon Donaldson MR in *WEA Records Ltd v. Visions Channel 4 Ltd* [1983] 1 WLR; [1983] 2 All ER 589, CA).
>
> Opening an avenue for an aggrieved party to apply, in my view, provides the refinement of the process by which the judge deal with given application which he may not have satisfactorily done by hearing only one side of the story. The application to set aside therefore provides the means by which he can review if necessary, his own decision. To quote the notes at p. 2255 of 1998 Desk Edition of the *Malaysian High Court Practice*:
>
> > The rule protects the basic right accorded to litigants, that a party who has not had the opportunity of being heard may apply to the court to discharge an order obtained in his absence: *Boyle v. Sacker* [1888] 39 Ch D249 at 251.
>
> I would not therefore accept the submission of counsel for the plaintiff that the 4th defendant had no right to apply to set aside the decision heard on the merit by Steve Shim J in this application and that his only recourse was to appeal to the Court of Appeal.

[30] See also the cases of *United Engineers (Malaysia) Bhd v. Seow Boon Cheng & Anor* [2001] 6 CLJ 190, *Ber: Pardeep Kumar Om Parkash Sharma; Ex parte: Abdullah Sani bin Hashim* [2001] 1 LNS 94, *Uni Wall Architectural Products & Services Sdn Bhd v. Global Upline Sdn Bhd (No 2)* [2011] 6 CLJ 477 and *Konsortium Abass Sdn Bhd v. Syarikat Bekalan Air Selangor Sdn Bhd; Kerajaan Negeri Selangor (Third Party)* [2012] 1 LNS 1046 which confirmed that setting aside an *ex parte* order is allowed under the Rules of High Court 1980/Rules of Court 2012.

[31] Be that as it may, the Senior Assistant Registrar who entertained the preliminary objection raised by the judgment debtor and in the result summarily dismissed the application to set aside the *ex parte* order without hearing the merits of the application, should have considered O. 1A Rules of Court 2012 which reads as follows:

> 1A. Regard shall be to justice (O. 1A)
>
> In administering these Rules, the Court or Judge shall have regard to the overriding interest of justice and not only to the technical non compliance with these Rules.

[32] In this respect, it is gainsaid that the Senior Assistant Registrar should be enlightened on the importance of the overriding interest of justice as opposed to technical non compliance of the rules by reference to the case of *Amirthanayaki Kumarasamy v. Lembaga Kelayakan Profesion Undang-Undang, Malaysia* [2010] 6 CLJ 593 (Court of Appeal) where Ramli Ali JCA (now FCJ) at pp. 600 and 601 held as follows:

A [12] ... No prejudice was ever occasioned to any party in the proceedings including the court. To strike out the appellant's application at this stage of the proceedings (without hearing the merits) is obviously unfair to the appellant who came to court to seek justice and a fair hearing.

[13] The above finding is in line with the provision of O. 1A of the Rules B of the High Court 1980 which stresses that the court or judge shall have regard to justice of a case.

[14] Such procedural technical objections (as in the present case) should not be allowed to obstruct the process of justice to the deserving. As we move towards the era of facilitating the process of litigation, the raising C of the objection on technical grounds would certainly and clearly be a thing of the past. It is a clearly the intention and wisdom of the Rules Committee to provide for the smooth administration of the due process and administration of justice by way of substantial merits of the case and not merely on procedural technical defaults. (see: *Beauford Baru Sdn Bhd v. Gopala Krishnan a/l VK Gopalan* [2002] 3 CLJ 686).

D [15] A judge should not be so besotted by the rules that his sense of justice and fairness becomes impaired because of his blithered fixation on technicalities of the rules and the cold letter of the law (see: *Megat Najmuddin bin Dato' Seri (Dr) Megat Khas v. Bank Bumiputera Malaysia Bhd* [2002] 1 CLJ 645 per: Mohtar Abdullah FCJ).

E **[33]** Hence, it is my considered view that the judgment creditor should be allowed to have encl. 87 heard on merits instead of being summarily dismissed based on the preliminary objection which was baseless and misconceived.

[34] The judgment creditor is only seeking his right to be heard in encl. 87 F and as such justice should be accorded to him without any technical hurdles placed along the path.

[35] Last but not least, counsel for the judgment creditor managed to unearth an old bankruptcy case of *Re Chops Loh Kee Seng and Loh Chee Seng* [1926] 1 LNS 11 (High court) where Deane J decided as follows:

G This is an application to the Court to rescind an *ex parte* order made in this bankruptcy on 11 December 1925,

... The application is made under s. 90(1) of the Ordinance which gives the Court power to review, rescind or vary any order made by it under H the bankruptcy jurisdiction, and the case of *Re a [85] Debtor; ex parte Goldstein* [1917] 1 KB p. 558 establishes clearly that the applicants who feel themselves aggrieved thereby have adopted the proper procedure in moving the Court to rescind the order. In that case where the question was raised Shearman J is reported as saying:

I The other question, namely, whether a person summoned for examination may appeal from the order when he is not party to it, requires very short treatment. The whole practice of our Courts of Justice is permeated by the principle that if an order affecting any person is made *ex parte*, and he is aggrieved thereby, he does

> not appeal from the order, but comes before the Court with a summons or motion to set it aside. In the present case s. 108 of the Bankruptcy Act 1914 expressly provides that any order may be reviewed and rescinded or varied. The appellant was aggrieved; he took the proper course in applying to set aside the order by which he was aggrieved.
>
> The application therefore to rescind must be considered on it merits.

which precisely allows an aggrieved party to set aside an *ex parte* order under s. 90(1) Bankruptcy Ordinance No. 44 (1888) in bankruptcy proceeding.

[36] Section 90(1) Bankruptcy Ordinance No. 44 reads as follow:

> 90(1) The Court may review, rescind or vary any order made by it under its bankruptcy jurisdiction.

and as such word for word in *pari materia* with s. 92(1) Bankruptcy Act 1967. Hence, the case of *Re Chops Loh Kee Seng* (*supra*) clearly authorised an application to set aside an *ex parte* order in bankruptcy matters pursuant to s. 92(1) Bankruptcy Act 1967.

[37] To reiterate, the judgment creditor is therefore correct in adopting the procedure of applying to set aside the order of discharge *vide* encl. 87, based on O. 32 r. 6, Rules of Court 2012 and/or s. 92(1) Bankruptcy Act 1967.

[38] In the event, based on my findings above, I allowed the appeal of the judgment creditor on the preliminary objection and ordered that encl. 87 be heard by the Senior Assistant Registrar on merits.